Supreme Court, U.S.
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No. 91-2063

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMODITIES EXPORT CO.,

Petitioner,

V

U.S. CUSTOMS SERVICE,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Opinion of United States District Court Eastern District of Michigan, Southern Division

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BEST AVAILABLE COPY

No. 76-72292

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COMMODITIES EXPORT CO.,

Plaintiff,

V

U.S. CUSTOMS SERVICE,

Defendant.

Argued October 11, 1990

Decided November 13, 1990

MEMORANDUM OPINION AND ORDER

At a session of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 13th day of November, 1990.

Present: The Honorable Lawrence P. Zatkoff
United States District Judge

This matter is before the Court on motion of the defendant, U.S. Customs Service, to dismiss plaintiff's Amended Petition for Supplemental Relief. This matter has been thoroughly briefed by both parties and is ready for review.

BACKGROUND

Plaintiff, Commodities Export, operates a duty-free shop in

Detroit, Michigan near the entrance to the Ambassador Bridge. The bridge connects the United States and Canada between Detroit and Windsor, Ontario. Commodities is a truly unique duty-free shop in that it is not beyond the point of no return. The point of no return is the point at which a customer carrying goods recently purchased from the duty-free shop must take them through a customs checkpoint in order to bring them into the United States. After purchasing goods at Commodities, customers may either cross the bridge into Canada, or stay in Detroit. Upon crossing the bridge, customers of Commodities are obviously forced to go through a customs checkpoint prior to entering the United States with the goods purchased. Customers who fail to cross the bridge do not go through a customs checkpoint. Because of Commodities' unusual location, there existed a heightened risk of runaways. Runaways are goods that have been sold at a duty-free shop without taxes and duties, but which never leave the United States as required.

In 1976, Commodities obtained a court order in the district court commanding Customs to allow Commodities to operate its unique duty-free shop outside the point of no return. The order specified that surveillance and maintenance of the customs laws would be insured by putting a person on top of the Commodities duty-free shop in order to watch for runaways. In 1985, that court order was amended pursuant to an agreement between the parties allowing Commodities to comply with the customs laws, less expensively, by videotaping its operations.

Since the original court order in 1976, Customs has brought numerous assessments for liquidated damages against Commodities' warehouse bond. Commodities is required by law to maintain that bond to guarantee its compliance with the regulations for storing merchandise in and withdrawing it from a bonded warehouse. The Secretary of the Treasury is authorized to affix penalties to breaches of the conditions of

the bond and in particular, may access liquidated damages on the bond.

Under this authority, the Customs Service has notified Commodities of more than 20 assessments for liquidated damages. These damages are specifically based upon inventory shortages#, failure to mark certain goods in accordance with regulations, inadequate record keeping, inadequate marking of merchandise, unreported shortages and unreported breakage. An assessment was also issued for the total price of goods sold during a gap in the videotape of Commodities, operations which occurred on May 21, 1987.[1] Commodities has contested these liquidated damages and has asserted defenses to each claim. In 1988, Commodities filed a petition for supplemental relief in this court alleging that these damage assessments were an attempt by Customs to put Commodities out of business despite this Court's 1977 order. Commodities sought injunctive relief from the assessments. Commodities claimed it had done everything required of it in order to obtain review of the assessments. According to Commodities, Customs ignored all pleas for due process and instead, proceeded to enforce the claims without administrative review.

Judge Philip Pratt dismissed Commodities' suit for lack of jurisdiction.[2] That decision was remanded by the Sixth Circuit Court of Appeals. The Court of Appeals indicated that due process claims asserted by Commodities raised genuine issues of material fact entitling it to a hearing. The Sixth Circuit ordered a more thorough review of this matter

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[1]The record indicates that runaways account for approximately one-tenth of one percent of Commodities' total sales. However, the liquidated damages assessment was for the price of all the goods sold during the gap in the tape.

[2]The case was transferred to this Court's docket after Judge Pratt's death.

to determine whether facts existed to support Commodities, due process claims. Specifically, the Sixth Circuit has remanded this case for a hearing in order to resolve three issues. Firstly, whether Customs violated this court's previous order, compelling it to allow Commodities to run a duty-free shop, by seeking to ruin Commodities' business through the bringing of meritless or inflated assessments for liquidated damages in violation of the due process clause. Secondly, whether liquidated damages assessments are subject to the protest procedure set forth at 19 U.S.C. §1514, 1515 and at 19 C.F.R. §174. Thirdly, whether assuming liquidated damages are protestable, Customs misled Commodities into thinking that the only available route for obtaining review was the petition procedure under 19 C.F.R. §172.

A hearing in this matter was held October 11, 1990. This Court heard argument, but received no testimony. During the hearing, Customs agreed that protest procedures are no longer required to contest an assessment. Therefore, the issue of whether liquidated damage assessments are subject to the protest procedures set forth at 19 U.S.C. §§1514, 1515 and at 19 C.F.R. §174 is now moot. Accordingly, this Court will not address that issue.

OPINION

For the reasons which follow, this Court hereby GRANTS defendant's motion to dismiss.

I.

A.

Customs claims that this Court does not have jurisdiction over this matter because Customs is not attempting to violate this Court's previous orders. Customs claims that all of its liquidated damage assessments have been lawful and are reasonable. According to Customs, these assessments are set

by the conditions of the bond and are not set or assessed in an arbitrary fashion. Customs also asserts that these liquidated damages assessments are merited. According to Customs, the damage assessments have been based upon Commodities' failure to keep appropriate records, or properly mark and store merchandise. According to Customs, these failures on behalf of Commodities, violated the policy and procedure manual which sets forth standards Commodities should have followed. Customs has characterized the Commodities, bond as a contract between two parties which allows for breach damages. According to Customs, Commodities has breached the contract and, therefore, has been assessed liquidated damages. While Commodities has claimed it has not breached the contract, Customs claims that it has a valid factual basis for the assessment of liquidated damages.

Commodities submits that this Court has subject matter jurisdiction over this case because Customs is, in fact, trying to disobey this Court's previous order. According to Commodities, its status as the only duty-free shop not beyond the point of no return is a status which is unacceptable to Customs. Commodities claims that Customs is trying to disobey this Court's previous order by assessing outrageous and meritless liquidated damages claims in an effort to put Commodities out of business. Commodities claims the number and amount of these liquidated damage assessments is unprecedented throughout the nation.

Commodities asserts that, in fact, evidence exists which indicates that Customs has attempted to put Commodities out of business. Commodities submits there is no valid or reasonable factual basis for the liquidated damage assessments of Customs. According to Commodities, any allegations that it has violated the policy and procedure manual is actually a pretext to Customs' effort to force Commodities out of business. Commodities claims that the policy and procedure manual is not regulation. According to Commodi-

ties, Customs has even informed Congress of the fact that the manual does not contain regulations, but merely policies and procedures which are not binding on anyone. (Commodities' Answer to Motion to Dismiss, Exhibit, pp. 74-75). Of the approximately $170,000 in bond liquidated damages pending before this Court, Commodities asserts that $136,200 are based on Customs' Policy and Procedure Manual.

Commodities also submits that Customs has indirectly attempted to put Commodities out of business by writing threatening letters to Commodities' surety, Old Republic, demanding it to pay the liquidated damages claims assessed against Commodities. According to Commodities, these threats have jeopardized Commodities, ability to maintain a bond and keep a surety. If it loses Old Republic, Commodities claims it will be unable to find another surety. In addition, Commodities has alleged that these liquidated damages have placed its credit rating in jeopardy. At every stage, Commodities claims that it has contested the assessed liquidated damage claims and has asked for a hearing. According to Commodities, Customs has ignored these requests. Customs has allegedly threatened to pull the bond and/or cut services in order to put Commodities out of business.

Upon hearing argument and reviewing the brief s submitted by the parties, this Court finds that Customs has not attempted to circumvent this Court's earlier order by attempting to put Commodities out of business. The assessments appear to be reasonable and meritorious. Commodities, on the other hand, claims to have valid defenses. The real issue is whether plaintiff's records were kept in accordance with the regulations. Commodities claims that the policy and procedure manual is not a regulation. Whether the manual is a regulation and whether plaintiff's records are kept in accordance with Customs' regulations are issues which need to be litigated. However, the fact that such litigation is necessary

in no way shows that Commodities' due process rights have been violated or that Customs has attempted to destroy Commodities' business. In fact, the record shows that of the more than twenty liquidated damage claims which have been filed against Commodities, only a few remain. Those which remain total approximately $170,000 in outstanding liquidated damage assessments. The remaining claims have either been resolved or dismissed upon a showing by Commodities that Customs had no grounds for asserting such damage claims. These facts indicate that Customs and Commodities have been able to work out an agreement as to some of the liquidated damage claims. However, because certain questions need to be litigated, disputes over the remaining claims still exist.

Furthermore, this Court finds that Commodities has failed to show any damage due to the alleged bad credit rating or alleged threatening statements made to Commodities, surety, Old Republic. Commodities has characterized Customs, letter to the surety as a threat. However, this Court has reviewed that letter from Customs to Old Republic Insurance Co. and finds that it is not a threat. Instead, the letter is a formal written demand for payment of liquidated damages incurred by Old Republic as a surety on Customs' bond. The letter states in relevant part that:

> Unless payment in full is received by this office on or before September 23, 1988, appropriate Customs officials in the Detroit District will be notified to refuse acceptance of new bonds written by you as surety and to reexamine whether your current bonds provide the security intended of them. Also, we will be further reviewing the extent and number of payment deficiencies to determine if reasonable grounds exist to believe that your company is not honoring its obligations in other cases. Such circumstances could warrant that the matter be forwarded

> to Customs Headquarters and the Department of Treasury recommending the withdrawal or revocation of authority to do business as a surety with the United States Government.

The next paragraph of the letter recognizes that the surety may, in fact, have a valid reason in fact or law for not paying on the bond. If so, Customs then asks the surety to communicate those reasons in writing for immediate consideration. Apparently, Old Republic failed to give its reasons in fact or law for not paying on Customs' bond and instead, ignored the Customs' letter.

This Court finds that the letter written by Customs to Commodities' surety was not written as a threat or in threatening fashion. Instead, it was written in accordance with 19 C.F.R. §113.38(4). Section 113.38 discusses delinquent sureties and the non-acceptance of bonds written by sureties that, without just cause, are significantly delinquent on other bonds. Section 113.38(4) states as follows:

> Notice of Surety. The appropriate Customs officer may take the above actions only after the surety has been provided reasonable notice with an opportunity to pay delinquent amounts, provide justification for the failure to pay, or demonstrate the existence of a significant legal issue justifying further delay in payment.

The letter which Commodities characterizes as a threat is actually a letter written to Old Republic pursuant to §113.38, because Customs believed old Republic was a delinquent surety. The letter stated that unless payment on the bond was paid in full by a certain date, Customs, officials in Detroit would be notified to refuse acceptance of new bonds written by the surety because Customs believed the surety was not honoring its obligations in other cases. The letter also

acknowledged that Commodities' surety could dispute its obligation and fail to pay due to significant non-frivolous questions of fact or law. Accordingly, this Court finds that the language in Customs' September 6, 1988 letter to the surety was drawn from 19 C.F.R. §113.38. Although the surety was required to respond and show just cause, it failed to do so. In any event, Customs became aware that Old Republic was raising legal objections to the merits of the assessments and, therefore, pursuant to 19 C.F.R. §113.38, Customs declined to impose any sanctions against the surety.

B.

Customs asserts there has been no due process violations. In order for Customs to collect any money from Commodities, Customs claims it must first go to the Court of International Trade (hereafter CIT). Customs must bring a suit pursuant to 28 U.S.C. §1582(2) in order to collect a judgment on a liquidated damages claim. Customs asserts that in the CIT, Commodities will have an opportunity to defend itself completely at a *de novo* hearing. Before Customs can collect anything on its damages, it must bring an action and fully litigate its claims. However, Commodities asserts that this case does not belong in the CIT. Commodities asserts that this matter is within the jurisdiction of the district court pursuant to 28 U.S.C. §1352 and §1355. Therefore, this Court must address the question of where Customs can sue Commodities in the event Customs wishes to enforce its assessments.

An exception to district court jurisdiction pursuant to §§1352 and 1355 is found under 28 U.S.C. §1582. Section 1582 states that the CIT has exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States to recover upon a bond relating to the importation of merchandise required by the laws of the United States. . . 28 U.S.C. §1582(2) . Commodi-

ties asserts that in this instance, §1582(2) is inapplicable because the United States is not a plaintiff. Commodities also asserts that it is not in the importation business. According to Commodities, it is engaged in export only, pursuant to §1555(a).

This Court finds that the arguments previously asserted by Commodities with respect to the applicability of §1582(2) have already been addressed by the CIT. Commodities has already asserted that an action to enforce a liquidated damage claim does not arise out of an import transaction. Nor would such an action be brought to recover upon a bond relating to the importation of merchandise. These are two requirements of the exclusive jurisdiction of the CIT. In a suit brought by the United States against Commodities to recover unpaid liquidated damages in the amount of $6,292.96, plus interest, the CIT ruled that the action arose out of an import transaction and was brought to recover on a warehouse bond which related to the importation of merchandise. (*U.S.A. v. Commodities Export Company and Old Republic Insurance Company,* Court No. 89-03-00144, 1990). In that case, Commodities essentially argued the exact same argument it has brought before this Court. Specifically, Commodities asserted that it could not be characterized as dealing with import transactions since it operated "exclusively in export." The CIT analyzed the word "importation" as interpreted in the trade laws. The CIT reviewed several Supreme Court cases and made the following finding:

> ... the Supreme Court tacitly acknowledged that foreign-made goods in customs warehouses are imports when it wrote that "imports may be stored duty free for prescribed periods" in bonded warehouses.

Xerox Corp. v. County of Harris, Texas, 459 U.S. 145, 150 (1982). This concept was restated in *R. J. Reynolds Tobacco*

Company v. Durham County, North Carolina, 479 U.S. 130 (1986) in which the Supreme Court dealt with the issue of foreign-made goods stored in CustOMs' bonded warehouses under 19 U.S.C. §1555. "Referring to goods stored in a class 2 warehouse, as the goods in the instant case were, the court inferred that such goods are importations, but simply are not subject to duties unless withdrawn from the warehouse and injected into the stream of commerce of the United States. *Id.* at 133-34. Hence, while the Supreme Court has not explicitly held that foreign-made goods in bonded warehouses are imports, the implication that they are is quite clear." *U.S.A. v. Commodities*, (*supra*) pg. 10.

Commodities has argued that importation means the goods have entered the stream of commerce of the United States. Upon review of the word "importation" and its related terminology, the CIT did not come to the same definition as that asserted by Commodities. Instead, the CIT concluded that: "once goods are within the jurisdictional limits of the United States with the intent to discharge, they are imports under this definition. As the goods in this action had already passed into the bonded warehouse, they were well beyond that point." *Id.* at pg. 11.

The CIT was likewise not persuaded by Commodities' argument that its bond did not refer to importation. Referring to the Supreme Court's opinion in *R.J. Reynolds*, (*supra*), the CIT stated:

> The central purpose behind the Customs' bonded warehouse [is] to insure that federal customs' duties are collected.

479 U.S. at 131. "While the bond is not entitled @importation bond, and does not refer to the importation of merchandise, it clearly was designed to deal with instances where duty-free goods have, in fact, entered into the stream of

commerce of the United States without payment of the appropriate duties and taxes. As such, the bond related to the importation of merchandise." *U.S.A. v. Commodities*, (*supra*) at pg. 13. As a result, the CIT has clearly concluded that suits to recover unpaid liquidated damage assessments could, in fact, be brought in the CIT by Customs against Commodities pursuant to 28 U.S.C. §1582(2). In the event Customs desires to collect liquidated damages from Commodities, Customs must file a lawsuit pursuant to §1582(2).

This Court also finds that Commodities has no independent right to a "full-blown" hearing conducted by an ALJ pursuant to the Administrative Procedure Act.. Neither party has pointed to a specific statute, and this Court cannot find a specific statute, which allows Commodities the right to an APA hearing. Instead, this Court finds that pursuant to the Customs laws and regulations, Commodities could have obtained relief through use of the petition process set forth in 19 C.F.R. §172. However, Commodities asserts that it was misled by Customs into believing that only the protest procedure was available. As a result, Commodities may not have utilized the petition process to its full potential. At the hearing, Commodities also argued that the petition process was somewhat of a "kangaroo court" in that Commodities would not have appealed to a neutral party, but rather would have been asking Customs to change its mind. This Court finds that even assuming this to be true, no due process violations could occur. Even if the petition process ended in favor of Customs and Commodities was denied its requested relief, Commodities still could not lose its property without a hearing. Even if Commodities lost at the petition process level, Customs could not have obtained a judgment and could not enforce or attempt to collect its liquidated damage assessments without becoming a plaintiff pursuant to 28 U.S.C. §1582(2). To recover any damages, Customs must bring a lawsuit against Commodities. During that suit, Customs' assessments would be presented to an impartial trier

of fact. The reasons for Commodities' failure to pay those claims would also be presented. As a result, before Commodities would actually be liable on the assessed damages claims, Commodities would receive a full hearing, during which it would have an opportunity to present its defenses, cross-examine Customs' witnesses and argue its case. Due process requires nothing more.

C.

According to Commodities, certain Customs agents and/or officers have made statements indicating they will do everything in their power, and even beyond their power, to insure that Commodities no longer does business as a duty-free store.

Customs asserts that any alleged employee threats made to Commodities with respect to cutting services to Commodities or closing Commodities down is insufficient to survive a motion to dismiss. Even assuming those threats were made, Customs submits the employees who made them could not follow through on their threats. According to Customs, there has also been no evidence shown which indicates that the employees attempted to follow up on their threats. Nor has any evidence been shown indicating these employees succeeded with their threats. Without more, Customs asserts that these alleged threats in no way indicate or prove that Commodities, due process rights have been violated.

Customs, employees Silverman and Maton allegedly threatened to close down Commodities' business or in some way take away services. Even assuming the threats to be true, this Court finds that the threats have not violated Commodities, due process rights. The threats have not been followed-up or carried out in any way. Furthermore, the Customs law would give no authority to carry out such threats. (Affidavit of William L. Morandini, District Director,

Detroit District of U.S. Customs). In any event, Commodities has shown no damage from the alleged threats. Despite claiming he would close Commodities down prior to retiring, Silverman did not do so. Silverman has since retired and Commodities is still in business. If anything, this Court finds that these threats appear to be the result of antagonism between the parties due to the intensity of this dispute. Not only have these parties hotly contested these damage claims, but the parties' attorneys have also inflamed their arguments to this Court and the Court of Appeals. In fact, the Sixth Circuit even had to address this intensity by asking the parties to more thoroughly and carefully analyze the issues and be less inflammatory. (*Commodities v. U.S. Customs,* 888 F.2d 431, 435 (6th Cir. 1989)).

D.

Finally, Customs asserts that Commodities' FOIA requests are insufficient to give this Court jurisdiction. This Court agrees. The Sixth Circuit has indicated in its opinion that no jurisdiction can exist merely because of the FOIA request, unless the refusal to comply with those requests somehow supports a claim that Customs sought to ruin Commodities, business. No such showing has been made in this instance. This Court concludes that Commodities' FOIA request does not alone create jurisdiction in the district court. The facts show that Commodities' FOIA request was declined as being too amorphus. The FOIA requests of Commodities were not denied by Customs, local office, but rather, at a higher level. Furthermore, plaintiff has been provided numerous documents and does not appear to have been hampered by the FOIA denial. Finally, Commodities has failed to bring a separate action for FOIA disclosure. As a result, this Court finds that the failure to comply with Commodities' FOIA requests does not involve a due process violation.

II.

With respect to Commodities, argument that it was misled by Customs into believing that it could only utilize the protest procedure to object to the assessed damages, this Court finds that such an argument does not create a due process violation. Customs asserts that it has in no way misled Commodities into believing that the protest procedure was the only one available. Even assuming that Customs did mislead Commodities, this Court still finds no due process violation. As already stated, Commodities was still guaranteed a due process hearing prior to the enforcement of any Customs assessment.

III.

During the hearing, Commodities made several requests which this Court has now addressed. Based upon the foregoing, this Court refuses to enjoin further enforcement of past assessments or assessments of future damage claims. The disputes which exist based on those Customs, assessments will need to be fully litigated at the appropriate time. Without making a finding as to whether Customs' assessments are valid, this Court finds that they have been reasonably brought pursuant to Customs' interpretation of the appropriate regulations. As a result, this Court finds that assessments have not been brought for purposes of putting Commodities out of business or for purposes of disobeying this Court's previous order. This Court also refuses to determine who should adjudicate disputes with respect to the TV/VCR monitoring system currently in place on Commodities' business location. Such disputes should also be litigated along with the assessment disputes.

This Court will not force compliance with Commodities' FOIA requests. Commodities' FOIA request was not denied at Customs, local office. Commodities has not filed a

separate suit. Commodities has also not shown any damages as a result of this denial.

Based on the foregoing and based on the previously cited opinion of the CIT, this Court also refuses to declare that duty-free stores are not subject to CIT jurisdiction. In fact" Commodities, argument with respect to the applicability of §1582(2) has already been addressed. The CIT has already determined that when Customs brings a suit against Commodities to enforce its liquidated damage assessments, such suit arises out of an import transaction and is brought to recover upon a bond relating to the importation of merchandise. Therefore, the requirements for exclusive jurisdiction in the CIT are satisfied.

CONCLUSION

Based upon the foregoing, this Court hereby finds that no due process claims exist which would in and of themselves give this Court jurisdiction over this matter. Accordingly, this Court hereby GRANTS the government's motion to DISMISS. However, in doing so, this Court specifically retains jurisdiction over its previous court order. If necessary, this Court will insure that Commodities is allowed to continue operating pursuant to that original order.

IT IS SO ORDERED.

Lawrence P. Zatkoff
United States District Judge